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THE LAW OF EMPLOYMENT

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A SUMMARY OF THE RIGHTS OF EMPLOYERS AND EMPLOYEES

BY
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FOREWORD

LAST autumn there were resumed, after a six year interval due to the Second World War, the Gresham lectures which were founded in Elizabethan times by the great Sir Thomas Gresham. Such of the lectures as relate to Law are intended not so much for those already deeply learned, but primarily for the citizen who wants to understand more fully the law which affects him at every turn. They are also for the student who is not yet too far involved in technicalities.

The subject, "The Law Relating to Employees and Their Employers," of the first four lectures delivered in this series was chosen because it concerns almost every man and woman at some stage in their lives. At the same time it has its attraction for the lawyer: it relates to a field where the Common Law still has great influence, where each decade sees important decisions on principle, and where there is still room for considerable further development—as in the matter of the misuse of confidential information and the more positive aspects of the duty of fidelity.

Requests were received that the lectures might be made available in more permanent form. Hence this work. Two Appendices have been added, one on "Enticement," and one (for which I am indebted to Mr. K. E. Shelley, K.C.) entitled "Patents and Copyright." The title has been amended: reference has been made to some further leading cases—and the text revised to incorporate the effect of decisions reported up to the 1st June, 1947.

The general style, however, remains that of the spoken word rather than that of a text book: and the contents are still meant primarily for those for whom the lectures

were intended—and in particular for employers and employees who wish to know how the Courts regard their respective positions under contracts of employment.

Members of the legal profession will normally prefer to consult the weightier volumes which deal with the exceptions as well as the main rules and which cite authorities in greater abundance. Yet every practitioner from time to time, when seeking light on some complex problem, finds it helpful to re-read the first principles applicable—and to have a ready reference to the case where those principles are well illustrated. For that further purpose, too, this small book may perhaps have its use.

E. S.

TEMPLE.
June, 1947

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CHAPTER I

ENTERING INTO EMPLOYMENT

INTRODUCTORY

THERE are few who are not at one time or another an employer or an employee. So it is only natural that each of us should occasionally find cause to wonder what are the legal rights of some situation which affects oneself or a friend. "Need I really stand for that?" may be the employee's question, when he feels he has been treated rather roughly; or the employer may ask, "Was he really entitled to take that line?" when the employee appears to speak or act out of turn. The following chapters deal with the general legal principles which apply to such problems as are normally likely to arise between individuals under a contract of employment. (In the eyes of the law every engagement to do work is a "contract"—whether it is made verbally, in writing, or—rarely in this particular field—by conduct.)

Here let it be noted that what follows is intended first and foremost to relate to the civil rights, liabilities, and duties of the individuals who are the parties to this form of contract. To take an example drawn from a modern adaptation of a nursery rhyme—

> "The King was in his Counting House
> Ironing out his shirt,
> The Queen was in the kitchen
> Cleaning up some dirt,
> The maid was in the parlour
> Eating bread and honey,
> When in popped a stranger
> And offered her more money."

These chapters will not be concerned with what are the rights of any resulting dispute between the employer

and the stranger[1]; they will simply deal with the legal position arising should the employee "walk out" without notice. Similarly, the rights of third parties against the employer for acts done by the employee belong to a different sphere than that here dealt with; and again, the rights of combinations of men or combines of masters come more conveniently under the heading of "Trade Union Law" and would need separate treatment which might well, of itself, fill a volume.

THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE

What is meant in these chapters by the word "employee"? Not every man who does work for reward or who renders services for reward is an employee. Substantially the test is the same as that applicable in legal text books to the word "servant," which now has a far broader meaning amongst lawyers than it has to the layman.

An employee is one who works under a contract of service; and the question whether a contract is one of service depends substantially on the measure of control which the employer is entitled to exercise over the acts of the employee. Usually, it will be found that there is control over the hours of work, over the place where the work is to be done, and above all over the manner in which the work is to be carried out.

By control, I do not mean that the employer is constantly interfering—but that he has the power to interfere when he chooses. Given this element of control, it does not matter how big is the salary of the employee or how small: nor whether he is paid by a third party or even—as was supposed to be the case with Head Porters in big European hotels before the war—he pays for the privilege of doing the work. Works manager, mill hand, and secretary all come within the definition.

[1] See now, however, Appendix I.

Care must, of course, be taken to distinguish between "service" and "services," between independent contractor and employee, and again between agent and employee. Thus, a doctor when attending his patients renders services—but is obviously an independent professional adviser; a builder does work for what is often loosely termed an "employer"—but is an independent contractor; and a traveller whilst he *may* be an employee (e.g. if in the whole-time service of one firm)-very often is simply an agent who does his own work in his own time, and may be selling the goods of more than one firm.

Border line cases can present difficulties. Thus, if one turns to the theatre, no one has any doubt that the chorus girl is an employee. But the leading lady would indignantly deny she was subject to control in the above sense—and might well be right. What would be the position of a film star, who is said to be directed at every turn, is a matter on which I will not be bold enough to embark—save to say that it would probably turn upon the actual wording of some complicated contract.

LEGAL CHARACTERISTICS OF THE RELATIONSHIP

The law regards the relationship of employer and employee as being in many ways a special one. Perhaps its chief legal characteristic is that it is the most prominent of what are termed "personal relationships." The law recognises that it is the especial right of the citizen to choose his employer, in the same way that the employer is free to choose who shall serve him. This freedom of choice was discussed in 1940 in the highest appellate Court (the House of Lords) in a case to which I will have cause to refer later.[1] Lord Atkin, one of the most eminent exponents of the Common Law, said[2]—

[1] See p. 37, *post*.
[2] *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] A.C. 1014.

> I had fancied ingrained in the present status of the citizen in our laws, was the right to choose for himself whom he would serve, and this right of choice constitutes the main difference between a servant and a serf.

The law has always been most strenuous, within its own sphere, to resist on principle any form of oppression which might turn the employment in effect into some form of bondage or slavery from which the employee cannot escape. As times change, the oppression may come from different quarters—but the principle remains.

The effects of this "personal" characteristic of the contract are shown in many directions. Thus, as will be discussed in another chapter, an employer cannot, without the assent of the employee, transfer the right to that employee's services to a third party. The employee, in turn, cannot do what can be done by parties to normal contracts, i.e. he cannot sub-contract his work. The builder is quite at liberty to arrange that the electrical work he has contracted to execute be done by some independent specialist, and indeed there is usually nothing to prevent him getting the whole contract work done under sub-contract; and the same applies in the normal course of business to contracts involving the manufacture of anything from motor-cars to hair-pins. But obviously the clerk is not allowed to pay someone, without the consent of his employer, to add up the latter's ledger, nor can the factory hand absent himself and send another to do the job in his place.

Again, the courts will never decree the specific performance of a contract of employment. That is to say, they will never order either the employer or the employee to employ or to serve respectively—under penalty of going to prison for contempt of court if they refuse. Similarly, the courts take care not to force an employee to work for the employer with whom he has a contract by granting an

injunction to restrain him from working for anybody else.

Injunctions to restrain employees from working during the contract period for certain third parties are, indeed, occasionally granted, e.g. to prevent some highly-paid employee working for a specific rival.[1] But in practice such injunctions are rare—and never issue when the result would be either to force a man into paid idleness or into a position where in effect he must work under his contract or starve.[2] Further, the court will not even consider the granting of any such type of injunction unless there is an *express*—as opposed to an implied—stipulation in the contract against working for others.

MAKING THE BARGAIN

The first step towards entering into an employment is normally an interview between employer (or his representative) and the employee. At this the prospective employee is entitled to "sell himself" in precisely the same way as a salesman is entitled to sell a line of goods. Equally, the employer is entitled to "sell the job."

In law there is nothing which says that the bargaining between the two parties must be characterised by that special good faith and full disclosure which must obtain in certain contracts like that of insurance; so the employee is not bound to disclose anything as to his past.[3] Each side is entitled to make the best of his story—but the limits are, of course, strict on this as in other cases of contract. No-one may tell a deliberate untruth or so state facts as to give an impression which he knows to be untrue. Such a course would be fraudulent.

It is perhaps curious that for employment, as for sale of goods, the rule in effect is "caveat emptor"—the buyer

[1] Cf. *Warner Bros.* v. *Nelson*, [1937] 1 K.B. 209.
[2] *Rely-a-Bell Co.* v. *Eisler*, [1926] Ch. 609.
[3] *Hands* v. *Simpson Fawcett* (1928), 44 T.L.R. 295.

must take his own precautions. But otherwise the man with a bad past might never be able to get on his feet again.

As regards references, these, as we all know, are normally confidential reports sought by the employer. Later[1] the rights of the employee to a reference are dealt with. It suffices at this stage to say that the employee has no responsibility for what is in the reference—unless he in some shape or form becomes party to the making of a false statement in it.

Above I have dealt with the legal aspect of the negotiations. From a practical point of view it must be remembered that the relationship of employer and employee is often one in which mutual confidence is essential. Nothing is more likely to shake that confidence than the discovery that a picture, painted in the preliminary conversations, has been heavily overgilded, or that an important fact has been withheld. So, in practice, the more of the full facts both parties can be told either during the bargaining or soon afterwards, the better will things as a rule turn out.

THE CONTRACT AND ITS TERMS

Is writing necessary? That is a question which is often asked—and, so far as the law is concerned, the answer is generally that there is no such requirement.

There are, however, a certain number of exceptions, and these have been introduced by Statute Law for the protection of the parties—normally the employee. The most important of the exceptions is where the contract is for a period of a year and a day or more, or for a complete year starting from some future day.

In 1677 the Statute of Frauds was enacted to prevent dishonest claims being made in respect of alleged agreements of employment of considerable duration—and also

[1] See p. 49, *post*.

in respect of a good many other matters which do not concern us here. The effect of this Statute is to make unenforceable, against anyone who has not signed an appropriate memorandum or note, contracts of employment of the duration I have just mentioned. The memorandum or note may be quite informal, may consist of several documents, e.g. a series of letters, and may be made before or after the employment has begun—but it must contain all the material terms of the bargain.

It is important to remember that this much criticised Act does not render contracts invalid—it merely insists that those who seek the aid of the Courts in respect of them must come armed with certain written evidence.

As regards some contracts "part performance" has been held to dispense with the need for this writing—but that dispensation does *not* apply to agreements for employment.[1] All the same, even if the vital written evidence is missing, that does not mean that an employee who has acted under the contract cannot recover reasonable remuneration—upon what is called a "quantum meruit"—for what he has done, but it does mean that no one can enforce in a court of law any of the terms except against a party who has signed a document that satisfies the provisions of the Act of 1677.

Further exceptions to the general rule exist: thus contracts of apprenticeship, certain contracts relating to sea service, and some contracts by corporations must be in writing. These exceptions are, however, not sufficiently important to be either listed here or their effect in individual instances given in detail.

Whatever may be the position at law, however, the fact remains that if the contract relates to any of the higher paid posts, or if it contains any special terms, some

[1] *Britain* v. *Rossiter* (1883), 11 Q.B.D. 123, C.A.

form of writing is highly advisable. This does not necessarily mean that a formal agreement has to be made out. A confirming letter from either side is all that is normally required. Even if it does not technically constitute a contract, it is highly important evidence as to what were the terms of the arrangement. Many a man has succeeded in upholding his rights under a bargain by writing, as soon as the terms are settled, a tactfully worded letter thanking the other party for what has been arranged, and setting out those of the terms which are of special importance. In the absence of such a letter, memories are inclined to grow dim after a time—and many people genuinely forget points made in a conversation if they did not themselves put them forward.

As regards the actual terms of the contract, provided the nature of the work is once agreed, the law can usually manage to imply the rest. On the other hand, the law can only imply such terms as are essential to the working out of the bargain and which would obviously have been agreed by both parties if they had been mentioned at the time.[1] It is not for the Court to imply terms simply because they would be reasonable.

Thus, it is important to fix anything which may be doubtful. This applies not only to remuneration, but to such things as the hours and place of work, holidays (for there are only a limited number of occupations to which special legislation, such as the Shops Act, is applicable), scales of expenses, duration of employment, notice, and any restraint on competition after the contract is completed. As regards the last point, an employer who wishes to have such a term in his contract (for its validity, see p. 53) should expressly arrange for it—as it will never be implied.

Apart from express agreement before the employment

[1] Cf. *Reigate* v. *Union Manufacturing Co.*, [1918] 1 K.B. 592, C.A., *per* Scrutton, L.J.

starts, terms may be introduced into the bargain by special custom affecting the trade or occupation (there are many such customs affecting domestic service), by express agreement during the employment, or by the conduct of the parties over a period. Another way in which terms are introduced into the bargain is by notices displayed in an office or factory. If such notices are in a position where the employee would normally see them, and he neither makes any protest against them nor obtains a special agreement contradicting them, he will find that in the course of time they will be deemed to be part of the terms under which he is working.

INFANTS

These can enter into contracts of employment on their own—and there is usually no need for either parent to be a party thereto. There are, of course, a number of statutory provisions which preclude children from entering into certain occupations or from working in others for more than specified hours and under restrictive conditions. Further, there are a number of special rules applicable to contracts of apprenticeship (which we have already noted, must be in writing)—and to some of those special rules there are exceptions by the Custom of the City of London. But we are only dealing here with the normal run of contracts; of these there are, of course, a large number which are entered into every day by those under 21 years of age, but which are yet not subject to special rules or restrictions.

In each such case the contract is binding provided that, taken as a whole,[1] it is for the benefit of the infant. If it is not for the benefit of the infant, then it is not binding upon him or her. In deciding this point the Court may disregard as having no weight either way a covenant

[1] *Doyle* v. *White City*, [1935] 1 K.B. 110, C.A.

which is invalid, e.g. because it is in improper restraint of competition.[1]

SOME STATUTORY SAFEGUARDS

In addition to safeguarding employees as to the manner in which, in certain instances, they must contract before the bargain is regarded as enforceable, the legislature, in the shape of the Houses of Parliament, has provided other protection for employees as regards certain terms of contracts. Most of these safeguards only apply to special cases and to the lower paid workers. Thus the Truck Acts guard against oppressive deductions from the wages of workmen and ensure their payment in current coin of the realm, whilst a special Act in 1883[2] provides that no wages may be paid to any labourer or artificer in a public house or its garden (with the exception of wages paid to his employees by the publican). There are many other protective statutes—but not of sufficient general interest to recite them here.

Generally speaking, however, employer and employee are free to make whatever terms they choose. The function of the law is to retain for each side freedom of choice as to employment, to safeguard against deception, and to leave employer and employee alike free, if they so wish, to end the relationship when they will—subject, of course, to the rights which are dealt with in later chapters.

[1] See p. 53, *post*.
[2] Payment of Wages in Public Houses Prohibition Act, 1883.

CHAPTER II

RECIPROCAL DUTIES

ALL the duties which each party to a contract of employment undertakes can, of course, be expressly agreed in detail—but only very rarely is this done. In a certain number of cases, the main obligations of both parties are set out in black and white or are agreed verbally in the course of discussion, but normally five points at most are dealt with in the negotiations, viz. the nature of the job, the hours to be worked, the length of notice to be given, the rate of remuneration, and when it is to be paid. Thus in practice the vast bulk of the contingencies that occur as between employer and employee are left to be regulated by terms implied by law.

How great are the gaps which have to be filled will best be understood when the importance and variety of the duties referred to in the rest of this chapter and those that follow are compared with the five points referred to above. It is in a field such as this that the Common Law demonstrates its powers and its adaptability, applying fundamental common sense in evolving rules and in keeping them sufficiently flexible both to meet the needs of multitudinous forms of employment, and to keep abreast of the changes of outlook that come about in each decade.

The application of the law to this subject has been principally worked out in the last 130 years—a relatively short space in the history of the Common Law. It was not until 1852 that the first text-book[1] on the subject was written, and since then every generation has seen important principles enunciated and explained. The 1931

[1] Smith on *Master and Servant* (1st Edn., 1852).

edition of that early text-book remarked that the nine previous years had seen no fewer than 100 cases on "Master and Servant" deemed worthy to appear in legal reports; and the most recent (1946) text-book[1] relates that in the last fourteen years there have been another 200 such cases. Though only a proportion of these 300 decisions deal with points discussed in these chapters, yet that proportion is considerable, and the figures cited show how the evolution of this branch of the law continues each year as points arise before the courts. In some matters—such as the definition of what is "confidential information"—further clarification is still much needed.

It is perhaps advisable here to emphasise that, whilst the Courts will imply terms in a contract wherever it is necessary—as opposed to being merely reasonable—so to do[2] (even in the case of the five points mentioned above), no such implication will be made where a point is covered by express agreement between the parties or by some custom applicable to the particular employment.

EMPLOYEE'S DUTIES

The Common Law, being in its essence the application of common sense, it will be found that the duties of an employee are, generally speaking, simply those which the average man would think out for himself, if he took the trouble so to do. The real difficulties which arise are more in the application of general rules to particular facts, than in formulating those rules.

Obedience. The first of the duties of an employee is to obey any lawful orders of the employer which relate to the employment and which do not involve him in any danger which he has not undertaken to run. Thus it is not within his province to disobey an order because he

[1] Diamond on *Master and Servant* (2nd Edn., 1946).
[2] *Reigate* v. *Union Manufacturing Co.*, [1918] 1 K.B. 792, C.A.

thinks that it will have a bad effect on the business and is thus unreasonable as regards his employer's interests. Naturally a wise employer will let those serving him give their opinions on such a matter, but the last word remains with him.

Again, in law the employer is under no obligation to regard the private interests of those who are in his employment—and the consequences to the office boy who takes himself off when refused leave to attend the traditional "grandmother's funeral," apply equally to those who absent themselves even when their private affairs are urgent and a refusal of leave appears from that angle to be quite unreasonable.[1]

The right to obedience is naturally limited to orders which it is lawful to execute, and to matters which are part of the work undertaken. Whether, for instance, it is a duty of the employee to work in some place away from the office to which he first goes, is a matter which depends on particular contract. Thus a secretary could not, in the absence of express terms in her contract, be asked to work in a different town, but a branch bank manager[2] might well be under an obligation to go where his employer wishes.

The only time an order can properly be given which involves risk to limb or to health, is when the employee has undertaken to do work involving a risk which he may lawfully run. A clerk could not be ordered to take a message along some perilous steel scaffolding, where the riveter might be reasonably ordered to go. There is similarly a difference in the liability of a secretary and a nurse to work where there is real danger from some serious infectious illness.

Efficiency. Everyone who undertakes work entailing a certain degree of skill is deemed to promise that he is

[1] *Turner* v. *Mason* (1845), 14 M. & W. 112.
[2] *Bouzourou* v. *Ottoman Bank*, [1930] A.C. 271, P.C.

reasonably efficient at the job. If he isn't, he can be summarily dismissed. (There is, of course, an obvious exception in the case of someone who comes to learn or who says in advance that he requires further training.)

Care. It is the obvious duty of everyone doing any work under a contract to take reasonable care to do it properly. The degree of care is in practice that which a normal person would take about his own affairs. The rights of the employer, if due care is not taken, are dealt with later; it is only necessary here to mention that distinction must always be made between want of care and an error of judgment—for the latter no liability attaches.

Accounting. The duty to account, which entails both reporting to the employer and handing over any monies received, naturally applies to any monies, goods, or anything else which may come in whatsoever circumstances into the hands of the employee with a view to being passed on to the employer: it also applies to certain things which come into his hands but which were never intended to be passed on.

The best known of this type of receipt is a "secret profit." This includes any special commission or present—anything which might be termed a "rake off," and any profit which may be made "on the side," or which would not have been made if the deal had been put through direct between the employer and the ultimate purchaser. It includes sums received for doing what the employee would have properly done in any event, as well as money received for a dereliction of duty—and the fact that the employer suffers no loss through the employee's action does not make any difference to the latter's duty to account for the profit and hand it over. (The employee can be made to disclose all the documents relating to the profit.)[1]

[1] See p. 44, *post.*

The right to obtain a Court order for an account exists during, as after,[1] the employment—but for obvious reasons is usually only enforced after the employment is over.

Fidelity. There are, in practice, two separate meanings attached to the word "fidelity." The first, and narrower, meaning is that which springs to the mind when one thinks of fidelity bonds. These deal mainly with frauds of a financial nature, which range from robbing the till to more refined methods of wrongfully making away with an employer's money. Thus, in one sense, the duty of fidelity is simply that of being honest in money matters.

It is, however, with the wider meaning that more interesting points arise. The duty of fidelity can, in this respect, better be defined as being a duty to serve the employer with good faith in all matters which concern the employment. Examples of breaches of this duty will show how wide is the area covered. Thus it is clearly wrong for a salesman, who is shortly going to set up on his own, to solicit, during the continuation of the employment,[2] his employer's customers with a view to attracting them to the new business when it is set up. Clearly, too, it would be wrong for a salesman to try and push the wares of a rival firm in preference to those that he was selling for his employer—whatever might be his motive. Again, it would be wrong for a skilled workman engaged on specialised and confidential work to give away to a competitor the secrets he had learnt.[3] On the other hand, there is no objection to his telling third parties anything which is not of its nature confidential[4] (providing he has not been expressly forbidden to pass it on) even whilst he continues in employment. In most cases it is a matter of common sense as to what can and what cannot be done.

[1] *Attorney-General* v. *Goddard* (1929), 45 T.L.R. 609.
[2] *Wessex Dairies* v. *Smith*, [1935] 2 K.B. 80, C.A.
[3] *Hivac, Ltd.* v. *Park Royal Scientific Co. Ltd.*, [1946] 1 Ch. 169, C.A.
[4] *Bent's Brewery* v. *Hogan*, [1945] 2 All E.R. 570; see also p. 50 *post.*

Generally the duty of fidelity is looked on as being rather of the negative variety, by which I mean that one thinks primarily of the things one must *not* do by reason of that duty. It has, however, positive facets as well. Thus it is because of his duty of fidelity that an employee may find himself under the unpleasant obligation of reporting to the proper quarters some act of misconduct on the part of his superior or his fellow employee.

The extent of this obligation has not as yet been worked out.[1] That such a report ought to be made when the employee finds his employer is being cheated is obvious. On principle the obligation would appear also to include reporting anything clearly wrong (e.g. flagrant disobedience or manifest incompetence) which is seriously detrimental to the employer's interests and which comes to the employee's knowledge in the course of his duties. Those last six words however may well give trouble one day to some Court trying to hold an appropriate balance between fostering a proper sense of the responsibility of employees and discouraging "snooping." In the meanwhile the normal employee should act upon the principle that it is up to him to report the wrong he cannot help discovering—but it is not for him to seek it out. Supervisory grades may, of course, have special—and larger—responsibilities.

After Hours. Generally speaking, what an employee does after hours is no concern whatsoever of the employer. He has normally no right to object if those who are employed by him take on some additional work during their spare time in order to supplement their earnings; similarly he has, as a rule, no right under his contract to interfere, however badly he may think his employees behave in their leisure hours. There are,

[1] *Swain* v. *West* (*Butchers*), *Ltd.*, [1936] 1 All E.R. 224, (Finlay, J.) and [1936] 3 All E.R. 261, C.A.

however, some quite important exceptions to this rule: one of these—the duty not to act in breach of good faith at any time during the employment[1]—has already been mentioned above, others will be discussed when dealing with those types of misconduct which justify dismissal.

MISCONDUCT

In dealing with the relationship of employer and employee, misconduct means the breach by the latter of any of his duties. If he is disobedient, careless, fails to account, or does not act in good faith—that in every case is regarded by the law as misconduct.

The remedies which are open to the master are to claim damages (if he has suffered them), to seek an injunction, and—if the misconduct is sufficiently serious—instantly to dismiss the employee.

In practice, a claim for damages is very rarely made whilst the employment continues, for the obvious reason that the resulting state of affairs would be too unhappy for all concerned; nor, as a rule, is such a claim made afterwards, if only for the reason that the employee is usually not "worth powder and shot." The right, however, remains, and in theory the employer can claim for the machine which is broken by careless mishandling, the customer whose business is lost because the salesman was too lazy to call, or for loss of trade due to a secret being handed over to a rival. Sometimes such claims are actually made—but usually only against the higher grade employee or if litigation is in any event taking place between the parties.

Claims for injunctions are also infrequent, and are not granted where damages provide a sufficient remedy to the employer.

The drastic remedy of instant dismissal is available

[1] *Hivac, Ltd.* v. *Park Royal Scientific Co. Ltd.*, [1946] 1 Ch. 169, C.A.

whenever the misconduct is really serious. That is the case if the breach of duty "goes to the root of the contract" or in any way renders the continuance of the personal relationship of employer and employee impracticable.

How serious the misconduct has to be in such cases is a matter of degree, and depends on the nature of the employment and on the facts of the particular case. True though the statement is in the last sentence, it is not very helpful to the student of these matters. Let him, however, take consolation; misconduct justifying instant dismissal is in some ways very like an elephant—rather hard to describe, but very easily recognisable if you see it. Take an instance which always comes back to my memory when this matter is discussed. There was an occasion when a butler of normally impeccable manners came into the room shortly before lunch garlanded with lots of little parcels strung on bits of string, and singing in no particularly melodious voice "For I am to be Queen of the May." He then went to the front door to let in a visitor—whom he welcomed with a fondness best suited to a near relative. Now, perhaps, you understand what is meant by misconduct of the more serious type usually being easily recognisable?

Even a single act of negligence may justify summary dismissal—but it would have to be some really exceptional act.[1]

Much greater difficulty arises when there occurs a cumulative series of minor incidents, none in themselves justifying instant dismissal—but which, taken together, have that effect. The difficulty here is as great as proving in a contested cause that "nagging" can be "cruelty." Each incident in itself seems trivial, and may even be amusing; though the effect taken as a whole may be really serious, that fact is hard to establish. Not only

[1] *Jupiter Insurance* v. *Schroff*, [1937] 3 All E.R. 67, P.C.

is it hard to define the point when the summary remedy becomes available—it is harder still to prove in court; and no employer should adopt this remedy for such a series unless he is prepared either to pay damages or to take serious risks in litigation.

THE EMPLOYEE'S PRIVATE LIFE

To justify summary dismissal for something not done in the course of the employment, the test is "does it seriously affect the conduct of the employer's business?" or "does it destroy confidence that must exist between the employer and the employee?" A frequently cited case is that of the stockbroker's confidential clerk who was discovered to be speculating in deals which ran into a hundred thousand pounds. The dismissal was held justifiable.[1]

Almost everything depends on the nature of the employment. This applies even where the act under consideration is a crime. Thus, for a factory hand to be convicted and fined for some black market offence has normally no bearing on his employment. On the other hand, for a manager of a café to be convicted of black market dealings in food, even though they be dealings on his own account, might well be regarded by his employers as having a vital effect when applying the above tests.

Similar reasoning applies to cases of drunkenness. As a rule, it does not matter what a commissionaire does as long as he turns up sober for work, and the same normally applies to subordinate clerks. But the position might be very different if the clerk was a confidential one, whom clients might think would babble when in drink—or if he happened to be Secretary to a Temperance Society.

Let us turn next to the vexed question of immoral relations between men and women. In the great bulk of

[1] *Pearce* v. *Foster* (1886), 17 Q.B.D. 536, C.A..

cases it does not matter how far an employee may go, but if the employer happens to be a School Authority and the employee a school mistress, then obviously immorality causing local scandal would have a grave effect. More difficult problems would in the latter case arise if there were some isolated act either during holidays out of the country, or in circumstances which would not normally attract notice. On the whole, however, it seems that the limits at which the employee's conduct in private life may affect his employer are readily recognised, for relatively few disputes of this nature come before the Courts.

EMPLOYER'S DUTIES

To Pay. From an employee's point of view, perhaps the most important of the duties of his employer is to pay—and to pay punctually. As indicated in the first chapter, there are a number of deductions which may not be made from any such payment—and normally the employer is well advised not to make deductions at all except where there is some specific sum owing to him, as, for instance, for money lent, or for some sum expended at the express request of the employee. (He must, however, make certain deductions under statutory obligations—such as P.A.Y.E.)

To Pay in Sickness? The extent of the employer's obligation to pay wages or salary during the absence through sickness of an employee has been the subject of considerable discussion in the Courts relatively recently. Four cases came up for consideration during 1939 and 1940, and the law on the subject is not regarded as being satisfactorily settled even yet. It is rather curious that this flare-up of legal interest should have occurred so recently, when one would have thought opportunity for the enunciation of principles would have permitted the subject to be finally decided a long while ago. Subject,

however, to any further tests which may be made—and particularly to any review of the subject which may be undertaken should a case come before the House of Lords —the rules are submitted (despite certain passages to the contrary in at any rate one judgment) to be as follows—

(*a*) If the remuneration is, in effect, payable for some specified work, then wages are not payable during periods of absence through sickness. Thus, they would not normally be payable to a piece-rate worker or to someone who is paid by the hour or by the day.

(*b*) If the remuneration is payable weekly or monthly, then, in the absence of express agreement to the contrary, it will normally be implied that the payments should continue even if the employee is temporarily absent sick. The cases to the contrary (which include that of a commissionaire[1] who was paid weekly) depend on special facts from which an "agreement to the contrary" was inferred.

(*c*) If the employment is on a long term basis, there is normally a right to payment whilst temporarily absent sick—and it would take, in practice, strong evidence to show an agreement to the contrary.

Any liability of the employer can, of course, be ended by giving proper notice terminating the employment—if this is desired.

One further point of some interest arises in these absence through sickness cases: if the right to receive remuneration continues, then no deduction can be made from payments on account of the receipt by the employee of National Health[2] or Insurance benefits.

It must be emphasised that the above rules apply to *temporary* sickness, for if the illness or incapacity is sufficiently lengthy to constitute in effect a frustration[3]

[1] *O'Grady* v. *Saper*, [1940] 2 K.B. 473, C.A.
[2] *Marrison* v. *Bell*, [1939] 2 K.B. 187, C.A.
[3] See p. 30, *post*.

of the employment, then the whole contract is regarded as discharged.[1]

To Provide Actual Work. The general rule is that so long as the employer pays whatever is due under his contract, he is—in the absence of some express stipulation—under no obligation to provide actual work. This may result in the highly unsatisfactory position of the employee receiving his salary or wages but not being able to exercise his occupation. At least it is a position which I think most people, even in these days, would think unsatisfactory—though there are always some who are not averse to receiving money for doing nothing.

There are, however, certain special cases where the employer is under a specific obligation to provide actual work. The *first* of these is where there is an express term in the contract to that effect. The *second* is where the remuneration payable under the contract is substantially affected by whether actual work is provided or not. Thus, in a contract of service, if the remuneration is either wholly, or to some considerable extent by commission, it is an implied term that opportunity to earn the commission should be given. (Distinction must be drawn between those decided cases which relate to contracts of employment, and those which relate to contracts of agency where there is no employment, as the implication may not exist in the latter class.) The *third* is where the employment is of such a nature that it is of primary importance for the employee to be able to exercise his talents, or publicly or otherwise to "keep his hand in." Such would be the case of a band conductor, assuming that his contract turned out to be one of employment.[2] The *fourth* is where the employment is for a specific post. Thus, where a man is engaged on a long term contract as chief sub-editor for

[1] See p. 34, *post.*

[2] *Bunning* v. *Lyric Theatre* (1894), 71, L.T. 396.

a certain paper, the abolition of that post in itself would constitute a breach of contract; and there is a decided case where the sale of the paper was regarded as equivalent of summary dismissal, and the man was held not to be obliged to stay on in some other capacity.[1]

Reimbursement and Indemnity. Whenever an employee is doing his work in an authorised manner (and that includes a manner impliedly authorised) and acts without negligence, the employer is under a duty to reimburse him for any expenditure which he may reasonably incur and to give him an indemnity for any liability which he may reasonably have undertaken or incurred.

Of course, this does not apply where the expenditure is due to the default of the employee: to take a common instance, he would not be able to charge the expenses of a taxi taken to keep an appointment, when he would have normally been able to take a bus had he not dallied too long over lunch. Again, the employee cannot claim either reimbursement or indemnity if the expenses or liability were incurred through his doing something which he either knew or ought to have known was unlawful. ("Unlawful" includes not merely breaches of the criminal law, but also acts which constitute torts, i.e. most civil wrongs.)

If, however, the employee is led to believe that what he is doing is, in fact, lawful, and if it is not obviously unlawful, then he can still claim to be reimbursed. Perhaps the most remarkable case of this kind is one which was decided in 1899 after the Jameson Raid.[2] There a man who had lost his leg in the operation, and had also lost his kit and otherwise suffered financially, made a claim to be indemnified because, although the Raid was in fact a criminal act, yet he had been misled by those who

[1] *Collier* v. *Sunday Referee Publishing Co.*, [1940] 2 K.B. 647.
[2] *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816, (Div. Ct.).

organised it into believing that it was lawful, as having the sanction and support of the British Government (which in fact it did not have). This was, of course, a case of fraud by the superiors of the plaintiff, but the opportunity was taken to lay down rules as to indemnity when an employee is misled by his employers into doing a criminal act which he thinks is lawful.

RESPONSIBILITY FOR ACCIDENTS

The question of real practical importance to an employee in the case of almost every accident is whether the employer has, or has not, broken his duty, defined below, to take reasonable care. If that duty has been broken, then the employee has a right to damages which, in practice, produces far more generous results than if he has to rely on the provisions of the Workmen's Compensation Acts or the new provisions with regard to National Insurance.

It is the duty of the employer to take reasonable care that none of his personal actions cause injury to his employees—but that, of course, is a responsibility which, whilst important in small businesses, tends to lose weight in dealing with larger concerns, and is of practically no avail when one comes to a really big business where the employer may hardly ever come into contact with those who serve him.

It is also his duty to provide reasonably safe premises, and reasonably safe equipment—and to keep both in proper repair. In addition he must provide what is usually termed, a reasonably safe system of work. If he fails in any of these duties he is liable to pay compensation in an action brought against him for negligence—and it is no defence that he put competent people in charge to see that proper precautions were taken.

Another of his duties is to provide competent fellow

servants. That is to say, he must take appropriate care when choosing his employees. If an accident occurs through the inefficiency of a fellow servant, and it is shown that he was taken into employment by the carelessness of the employer, then the latter is responsible for the effects of the accident. But in such cases the employer is not responsible for the choice if he has delegated the selection to a competent higher grade employee.

The above duties have been worked out by the application of principles of Common Law, and they have been worked out in relatively recent years with added precision in a series of cases, of which, perhaps, the best known is *Wilsons and Clyde Coal Co., Ltd.* v. *English*, [1938] A.C. 57.

In addition to his Common Law responsibility, the employer is under a duty to observe all those statutory obligations which are imposed by the Factory Acts or similar legislation and by rules made under them.

If an accident occurs through breach of any of the duties which are referred to above, the employee is entitled to recover compensation for his full loss of earnings to the date of the judgment of the Court and for the effect it may have on his future earning power in the labour market;[1] in addition he can recover any expenses to which he has been or will be put and a sum which is regarded, at any rate, as appropriate compensation for the pain and suffering he has incurred. But, of course, his rights will be seriously affected if he has himself been guilty of negligence. As regards accidents happening after 15th June, 1945, an assessment is made of the proportions in which the negligence of either side contributed to the result, and the damages recoverable are an appropriate portion of the full damages suffered. Thus, if the accident is due two-thirds to the negligence of

[1] No deductions are made for benefits receivable under an insurance policy—or for income tax.

the employer and one-third to the negligence of the employee, the latter recovers two-thirds of the damage he has suffered.[1] As regards accidents before that date, any contributory negligence of the employee debarred him from recovering damages.

EMPLOYERS' LIABILITY ACT, 1880

Whilst considering this branch of the law, it is usual to refer to the above Act. In practice, it was a rather half-hearted attempt to overcome some of the difficulties caused by the unfortunate doctrine known as "common employment" and referred to in the next paragraph. It is so little used nowadays as a foundation for actions, that it does not merit any considerable discussion in a work such as the present. Suffice it to say that its main effective provision is to make the employer responsible for the negligence of supervisory grades in cases in which "workmen" within the definition of the Act are concerned. Similarly, it makes the employer liable for the acts of a curiously anomalous class of employees—mainly signalmen and engine drivers.

The damages recoverable are, however, limited in amount to three years' wages of the workman injured, and there are special limitations as to the time in which an action may be brought and as to the notices which have to be given before bringing it. In short, it is one of those little-used Acts which should be consulted in detail in case one can unexpectedly bring a claim within its four corners—and should certainly not be relied on until one has refreshed one's memory as to those detailed provisions.

COMMON EMPLOYMENT

The normal rule that a man is responsible for his own negligence and for that of all those who work for him so

[1] For application of Law Reform (Contributory Negligence) Act, 1945, to Factory Act cases see *Cakebread* v. *Hopping Bros., Ltd.* (1947), 63 T.L.R. 277, C.A.

long as they act within the scope of their employment, does not apply without qualification as between employer and employee. For that reason the responsibility of employers in accident cases has had to be somewhat fully set out in this chapter.

It is the defence of "common employment" which prevents the full application of the normal rule. That defence originated from the quite sound doctrine that a man can make no claim for what he may suffer through a risk which he has voluntarily undertaken. But by one of the chances of the Common Law, the rule was developed on the basis that one of the risks which was voluntarily undertaken by an employee was that of his fellow employees being negligent. That in turn led to the principle being enunciated that where two apparently competent men were working for the same employer, they could not make a claim against that employer for each other's negligence, because they had undertaken the risks incidental to "common employment."[1]

That principle is still in force, but all lawyers are glad that its effect is being narrowed down, and that the tendency of the Courts is increasingly to limit its application. This whittling away is effected by construing in a limiting way the rule that the doctrine only applies to "work which necessarily and naturally or in the usual course involves juxtaposition, local or causal, of the fellow employees and exposure to the risk of the negligence of one affecting the other."[2]

Thus, the drivers of two motor omnibuses belonging to the same corporation are not regarded as in common employment if their vehicles collide with each other on the highway—as the relationship to the injured driver of

[1] Naturally the defence of "common employment" does not hold water if the fellow servant who has been negligent is to the knowledge of the employer unqualified to do the work.

[2] *Radcliffe* v. *Ribble Motor Services*, [1939] A.C. 215.

the one who drove negligently is considered to be no different than that of any other driver who happened to be on the road. But fine distinctions have, unfortunately, still to be made—as witness the fact that a trolley bus driver and a linesman on a tower-wagon repairing the overhead gear were recently held[1] to be in common employment.

And now, to add to the bewilderment of the layman, it has just been decided[2] that when two trams collide the position is different from that when two omnibuses hit each other: in the former case the drivers are in common employment—in the latter not.[3] Small wonder that Lord Atkin in *Radcliffe's* case, [1939] A.C. 215, said of the rule of "common employment" that judges and text-book writers look askance at it, that Lord Wright there spoke of it as based on a prejudiced and one-sided notion, or that many have suggested that the legislature should intervene and change the law on this point.

[1] *Lancaster* v. *L.P.T.B.* (1946), 62 T.L.R. 718.

[2] *Graham* v. *Glasgow Corporation* (1947), 63 T.L.R. 42, H.L.

[3] Legzl minds will readily grasp the distinction between the two types of vehicle, assisted in some cases by thinking back, if necessary, to the limerick of undergraduate days—

"There was a young man who said 'Damn'
It appears that I certainly am
A being that moves
In predestinate grooves
Not a bus, not a bus, but a tram."

CHAPTER III

ENDING THE EMPLOYMENT

It is in connection with the ending of an employment that disputes are most apt to arise, with the result that lawyers are called in on a number of those occasions. It is thus of considerable importance to have as clearly in mind as possible the various methods by which the contract can be brought to an end, and what are the respective consequences. The principles applicable are in practice simply those of the general law of contract.

BY AGREEMENT

The most common way in which an employment ends is by some method which is in substance that agreed by the parties. As has previously been pointed out, such an agreement may be in express terms or it may be by implication to be drawn from the known terms of the contract or from circumstances which arise later.

In the first place it is open to the parties to agree *at any time* that the contract shall be ended either there and then or on some future date and in such manner as they may choose to arrange. A mutual agreement of this type —which does not in any way depend upon the terms of the hitherto subsisting agreement—is legally referred to as rescinding the contract of employment. Such an agreement does not have to be in writing, even if formalities were necessary for the original employment, and like all other agreements, it can be express or it can be made by conduct as, for instance, by the parties mutually abandoning the contract.

In most cases, however, a contract of employment ends by some method which has been agreed as part of the

terms of employment. This may be lapse of time, as where originally a specific period, such as a year, was agreed as being the length of the engagement; it may be upon the happening of some event which has been agreed to be the signal for the ending of the employment; or it may be by notice.

As regards notice, the length of this may have been agreed expressly either at the outset of the employment or at any time during it, or it may be fixed by some custom or usage; if there is no such express agreement or custom, then the notice must be a reasonable one. When the Courts have to determine what is a reasonable notice, they have to look at the facts of the particular case, but naturally they can have some regard for what has been decided in similar cases, even if these do not go so far as to establish a custom: in some of the textbooks there are tables[1] which, in so far as they refer to cases decided in modern times, are useful in this respect to the lawyer. But, of course, the man who knows his own trade also knows from those amongst whom he works what in practice constitutes "reasonable notice" in that particular occupation.

THE UNEXPECTED

There are, however, a considerable number of contingencies which may arise, which may result in the contract of employment being brought to an end, and which are but rarely the subject of express agreement. Most of these contingencies fall under one or other of two main rules of the general law of contract. The first of these rules is that when the continued performance of a contract becomes, without the default of either party, impossible—as, for instance, when the fundamental basis upon which

[1] Cf. Diamond on *Master and Servant* (1946), p. 282, *Halsbury's Laws of England* (Hailsham Edn.), Vol. 22, p. 150.

it was entered into is destroyed—both parties are discharged from its further performance; in such a case the further performance of the contract is said to be "frustrated." The second rule is that when one party acts in such a manner as in effect to repudiate his obligations under the contract, then the other party is entitled to elect to treat the contract as at an end and thereupon is discharged from further performance of it: both sides, however, remain liable for any damages for previous breaches and the defaulting party also remains liable for damages for the repudiation itself.[1]

Death. The death of the employee invariably results in the contract of employment being discharged. The only difficulty which may arise is as to the precise right of the employee's executors to recover remuneration. The old, and hard, rule of Common Law was that no payments could be recovered except those which had actually fallen due before the date of death. If the employee was being paid for a specific job, or if he was being paid a periodic salary, then in so far as neither had become actually due when he died, no sum could be recovered by the executors. Thus, where an employee paid quarterly died in the fifth month of his employment, then nothing could be recovered for his estate except what had become due at the end of the third month.

But now the law on this subject has been altered. There are two relevant Acts, the Apportionment Act, 1870, and the Law Reform (Frustrated Contracts) Act, 1943. There are some doubts as to what is the exact effect of the former Act on contracts of employment, and there are as yet no decisions with regard to the latter which relate to such contracts. It seems, however, reasonably clear that by the provisions of either one or the other, the old rule has been mitigated, and there is

[1] Cf. *Heyman* v. *Darwins, Ltd.*, [1942] A.C. at p. 361.

now provision by which the Courts can do what is equitable and see that the employee's executors get reasonable remuneration, whatever be the precise terms of the contract of employment.

The death of the employer similarly discharges the contract—in view of its personal nature. Here again the financial results under the old rules might be unfortunate. For it used to be the case that where a contract was discharged by frustration, the loss fell where it lay. Thus the apprentice or his relation who had paid a premium lost it all, even if the premium was meant to cover three years' training and the employer died within three weeks. Here again, the 1943 Act appears to come to the rescue, and would leave it open to the Court to do what is right in all the circumstances in apportioning how the loss should fall, and what repayment should be made.

Where the employer is a partnership, the death of any one partner normally ends the employment. There is said to be an exception where the relationship between the employee and the employer is so impersonal that it is of no practical concern to the employee as to who the partners are. In a decided case on the subject where the employees did not even know who the partners were[1] it was held that the death of one partner did not affect the contract; but the facts were rather special.

The consequences of the rule that the death of a partner discharges the contract of employment are naturally of considerable importance to the employee. The legal result is that both parties are freed from their future obligations, and this may well include freedom from any clause by which the employee was restrained from competing with the firm which is dissolved. On the other hand, if the employment was on a long-term basis, then the partners—as well as the employee—are freed from

[1] *Phillips* v. *Alhambra Palace*, [1901] 1 K.B. 59, at p. 63 (Div. Ct.).

their obligation and could not be sued for failure to keep the employee on, so his security of employment would in such a case disappear. In practice, however, these problems rarely arise, because the employee so often stays on, and if nothing further is said on either side the law implies that there is a fresh contract between the parties on the same terms as the old one. The only difficulty which may arise is where the contract is not enforceable unless in writing, and in such cases a fresh memorandum complying with the Statute of Frauds should be sought.

War. Of itself the outbreak of war normally has no effect on employment contracts. There are, however, a certain number of cases when the nature of the employment is such that when war breaks out further performance of the contract becomes impossible (which includes cases where it becomes illegal).

Thus a contract of employment in which the employee was in England but the employer was an enemy, would be discharged under the general rules relating to all contracts with an enemy—whether they be of employment or not. It is to be noted that "enemy" in this connection means someone resident in an enemy or in an enemy-occupied territory,[1] and has nothing to do with nationality.

Again, an employment under which the employee had to work in enemy or enemy-occupied territory might also be discharged as being impossible of performance.

Other cases in which the employment would be brought to an end by war conditions include such instances as where the employee is called up, or for that matter interned; or if the subject matter of the employment was destroyed—as would be the case of a man who was employed as a watchman of a building which suffered a direct and completely ruinous hit from a V2.

[1] *Sovfracht (V/O)* v. *Van Udens, etc.*, [1943] A.C. 203.

There is, however, no discharge of the contract merely because a substantial portion of the employer's business can no longer be carried on owing to war conditions.

Other Forms of Frustration. Just as the contract could be discharged by the destruction of a building by a hostile V2 (or, for that matter by a "friendly" one that went wrong), it can similarly be discharged if the building is destroyed by an earthquake or by an explosion or a fire arising without the default of the employer. Other instances to which the doctrine of frustration applies include the incidence of permanent ill-health—that is, such a period of illness as would substantially defeat the object of the contract. Mostly one thinks of this in terms of the illness of the employee who is employed on a long-term basis, but it might also apply where the employer was similarly taken ill or suffered incapacity from an accident. For instance, an author who had engaged a secretary for a year to take down his writings, might become so ill that it was clear that he could not for any material portion of that year do any writing at all: this would end the contract.

Just as in time of war various activities become illegal, so in peace-time legislation may come into force forbidding the doing of something which was the basis of the contract. Here, too, both parties are discharged through supervening impossibility. If, however, the activity is not forbidden in all circumstances, but only prohibited if no licence is obtained, then it is up to the employer to make all proper endeavours to obtain a licence—and the performance of the contract is not regarded as impossible until those efforts have been made and failed.[1]

Bankruptcy. Normally the bankruptcy of an employee does not affect his employment; it is, however, possible to think of cases where his bankruptcy would so affect

[1] Cf. *Taylor & Co.* v. *Landauer & Co.* (1940), 164 L.T. 299.

the position between himself and his employer that the contract would have to come to an end. So far, however, no such case has been reported.

Bankruptcy of the employer similarly does not of itself discharge the contract of employment, though obviously there are failures of duty by the employer which may ensue and which would in effect be a repudiation by him of his obligations and would thus leave it open to the employee to treat the contract as at an end.

Company Winding-up: Receivers. The law as to the effect of a winding-up or the appointment of a Receiver is not at present as clear as could be desired. As regards a *compulsory* winding-up, it can be taken that this generally operates as a wrongful dismissal—though there is some question as to the exact grounds on which this rule is founded. It is also sometimes stated that the appointment of a Receiver under a debenture likewise operates as a wrongful termination of the employee's contracts. The ground stated is that "someone else takes possession of the business," but the case cited[1] is an old one decided in days before it became so common to make Receivers agents of the company.

As regards *voluntary* winding-up, it is generally said that it depends on the particular facts of the case as to whether the employees are deemed to be dismissed or not. If the business comes to an end (except for the purposes of sale), then it can normally be taken that the employees' contracts are at an end.

Within the confines of the present chapters, no more can be said save that in the case of the weekly or monthly wage-earner the problem will probably be solved by whether or not he is kept on—for if kept on it will be impliedly upon the same terms as before and he will then incur no damages. If he is not kept on, then he will have

[1] *Reid* v. *Explosives Co.* (1887), 19 Q.B.D. 264.

the same rights as if he were wrongfully dismissed. When, however, one comes to long-term employment contracts, each case needs special consideration on the facts. It is only to be hoped that an occasion may before too long arise when the principles applicable may be clarified.

Two things should, however, be noted: firstly, that a liquidation often ends the authority of the employee to act on behalf of the company, with the result that he would lose his right to reimbursement and indemnity. Secondly, that if the contract does come to an end, then he is freed from any restraint on competition.

Dissolution of Partnership. A dissolution of partnership normally terminates an employment. Earlier this point has been dealt with under the heading of "Death"—but the rule applies whatever be the cause of the dissolution. There is, however, one important difference between a dissolution due to the death of a partner and a dissolution by some voluntary act. In the former case, as we have seen, the contract is in law discharged upon the basis that the event has occurred without any default on the part of any of the partners; a voluntary dissolution, on the other hand, is obviously not one which can be said to be without such default—and in consequence it constitutes in law a wrongful repudiation of contract as against the employee. The result is that in such cases the employee has a claim in damages, which does not arise where the dissolution is owing to death.

In practice, however, it is a very usual thing for a new partnership to be formed immediately after the dissolution of the old, and for the employees then to be kept on as before, in which case no question of damages arises as none are suffered. The employee, however, is at liberty to consider his position before carrying on with the new partnership—as mentioned previously. (Compare p. 32, *ante*.)

TRANSFER

In the first chapter I mentioned that it was one of the special characteristics of the personal contract between employer and employee that neither side could without the consent of the other transfer that other's obligations to a third party. That, of course, does not prevent the employer, the employee and a third party getting together and making a tripartite agreement by which the third party steps into the place of one or other of the original parties to the contract. Such a tripartite agreement is referred to as a "novation"; and assuming that the third party is the new employer (as so often happens when companies amalgamate), then the old contract being discharged, the employee's duties with regard to the future are normally all to the new employer.

How strongly the law leans against any assignment of the employee's services taking place without his consent has already been demonstrated[1] by the quotation from Lord Atkin's judgment in *Nokes* v. *Doncaster Amalgamated Colliery Co.*, [1940] A.C. 1014. In view, however, of the importance of this principle it is not without interest to cite two further passages from the judgments in that case. Lord Simon, at p. 1020, referred to the—

> fundamental principle of our common law—the principle, namely, that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve so that the right to his services cannot be transferred from one employer to another without his assent.

The second passage is another citation from the judgment of Lord Atkin (see p. 1030)—

> It is said that one company does not differ from another: and why should not a benevolent judge of the Chancery Division transfer the services of a workman to another admirable employer just as good and perhaps better. The answer is twofold. The first is that however excellent the new master may be it is hitherto the servant who has the

[1] See pp. 3, 4, *ante*.

> choosing of him, and not a judge. The second is that it is a complete mistake in my experience to suppose that people, whether they are servants or landlords or authors do not attach importance to the identity of the particular company with which they deal. It would possibly hurt the feelings of financial gentlemen with large organising powers and ambitions to know how strongly some people feel about big combinations, and especially amalgamations of small trading concerns.

The importance of the decision in that case is increased by the fact that there was under consideration Sect. 154 of the Companies Act, 1929, which gives the Court particularly wide powers to order transfers of liabilities and rights of every description so as to effect a beneficial amalgamation of companies.

The principles set out above are those of the Common Law, but of course it is open to the legislature to override that principle by suitably-worded Acts; and compulsory transfer of employees from the service of their previous employers to Government service and to the service of Public Corporations can be and is affected by nationalisation and similar measures.

INSTANT DISMISSAL AND WALKING OUT

The law applicable to those cases where an employee is summarily dismissed or where he walks out of his employment without giving proper notice, is the same as that which applies to the termination of all contracts. In the case of every contract when one party is guilty of an act which is a serious breach of one of its fundamental provisions (which include any provision which the parties have made into a condition precedent), that act constitutes a repudiation of the contract; thereupon the other party, conveniently called the injured party, has the right to elect as between two courses.[1] The first is to treat the contract as at an end (retaining, however, any

[1] See *Heyman* v. *Darwins, Ltd.*, [1942] A.C. at p. 361.

right to claim damages for past breaches or for the repudiation itself); the second is to go on with the contract. If he elects to go on with the contract (retaining any right to claim damages for past breaches, but not for repudiation), then it remains in force as before.

It is thus to be noted that when once the employer has full knowledge of some misconduct on the part of the employee which constitutes a cause for summary dismissal, and he then with that knowledge deliberately keeps the employee on, he cannot later turn round and dismiss him for that act of misconduct. This particular application of the normal principles of contract law is often in relation to contracts of employment referred to as condonation. (Naturally this rule applies conversely where the employee elects to stay on after the employer has been guilty of such a breach of the contract as would entitle the former to leave at once without notice.)

The question as to what degree of misconduct or what type of act on the part of the employer entitles the other party to the contract to end the contract at once, has already been discussed.[1] It has been pointed out that as regards the employee the serious breach—misconduct as we have called it—may take the form of disobedience, inefficiency, negligence, fraud, or any act which destroys confidence between the parties. Similarly, with regard to the employer, the serious act may take many forms, as, where, for instance, he insists on the employee engaging upon work inferior to that for which he was employed, where the employee is assaulted or unjustifiably insulted in front of others of the staff, or where some fundamental term of the employment is denied by the employer, e.g. the right to commission.

It is, however, often a question of degree which determines whether the injured party has a right to regard the

[1] See p. 18, *ante*.

contract as repudiated. When considering this point and when deciding which of the above two courses he will elect—to treat the contract at an end or to go on with it—it is as well that he should have in mind what are the consequences of his election should he *rightly* treat the other's act as a repudiation, and equally what would be the consequences if he should treat it as a repudiation, but be *wrong* in so doing.

Taking first the case where the employer dismisses the employee summarily. Either he is right or he is wrong in his view that the employee's act was one which warranted such a dismissal. The following shows the results—

(*a*) *If the employer was right*, then, firstly, the employee forfeits all wages or other remuneration other than that which has become definitely payable before the dismissal. (If the dismissal takes place in the middle of the month where the salary is paid monthly, then nothing is recoverable by the employee for the half-month which he has already served.)

Secondly, the employer can not only sue the employee for any damages suffered by reason of the particular act of misconduct, he can also recover damages[1] for the repudiation of the contract.

Thirdly, the employee remains bound by any valid terms of the contract which restrain him from competing with his employer after the employment is over.

(*b*) *If the employer was wrong*, then, firstly, the employee can recover against him damages[1] for wrongful dismissal which would include the proportionate sum due for the half-month previously mentioned.

Secondly, the employee will, of course, remain liable for any damages caused by his particular act of misconduct.

Thirdly, the employee will be freed from any term of

[1] See pp. 45–8, *post*, for measure of damages.

the contract restraining him from competition either during the contract period or afterwards.

Turn now to the case where it is the employee who has to make the decision whether or not he is entitled to regard his employer's act as a repudiation of a contract and in fact decides to walk out at once—

(*a*) *If the employee is right*, then the result in law is substantially the same as if he had been wrongfully dismissed, i.e.—

Firstly, he can recover against the employer the same damages as in an action for wrongful dismissal.

Secondly, he has his right to recover any damages suffered by reason of the particular act complained of—in addition to those damages recoverable for its being a general repudiation.[1]

Thirdly, he is freed from restraints on competition which might otherwise be valid.

(*b*) *If the employee is wrong*, then the result in law is substantially the same as if he had been justifiably dismissed summarily, i.e.—

Firstly, salary and other remuneration (except that which had actually become due before the dismissal) are forfeited.

Secondly, he is liable for damages suffered by the employer on the basis that the employee has wrongfully repudiated the contract.[1]

Thirdly, he remains subject to any valid restraints contained in his contract with regard to future competition.

Generally, it is to be noted that if an action for wrongful dismissal comes before the Court, when once the employee shows that his employer has not given him the notice provided by the contract, then the onus lies on the employer to prove facts justifying the summary action; similarly, where the employer proves that his employee

[1] See pp. 45–48 *post*, for measure of damages.

has walked out without giving proper notice, the onus devolves on the latter to prove that he had good cause for so doing.

NEED THE GROUNDS BE STATED?

One of the problems which may arise somewhat urgently when an employer has decided to take the summary action of dismissing the employee without notice, is as to whether he should state the grounds on which he is acting. So far as the legal position is concerned, it is clear that he is under no obligation to give those grounds.

When a dispute comes before a Court, the point for decision is whether on the facts proved to the Court to exist at the time of dismissal, the employer had good grounds for the action he took. Thus the employer can rely not only on grounds which he knew but did not mention at the time, but also on grounds of the existence of which he was not then aware.[1] It may even happen that he cannot establish the grounds given at the time—either because the evidence is not forthcoming (a witness may have died) or he may even prove to be mistaken in his facts—but he may yet succeed because of the existence of the other facts which have later been discovered.

Perhaps the above rules can be made clearer by an example. Let us suppose that an employer is informed that a confidential clerk has committed two separate acts of misconduct, each justifying summary dismissal—having deliberately disclosed a trade secret to a rival firm in the morning and grossly insulted the head of his department during office hours in the afternoon. The clerk is thereupon dismissed and told that the ground of his dismissal is improper conduct towards his superior—the discovery of the other offence not being mentioned. He then brings an action for wrongful dismissal, but between

[1] *Boston Deep Sea Fishing Co.* v. *Ansell* (1888), 39 C.D. 339, C.A.

the time it is started and the date it comes on for trial—

(*a*) the head of the department dies,

(*b*) the employer finds out that the clerk embezzled £50 a few days before being dismissed.

At the trial, even if there is no evidence available as to the insult, the employer can (upon giving due notice of his intention to do so) rely on the deliberate disclosure of the trade secret *or* the embezzlement or both: if he proves *either* he will succeed.

If the question of stating grounds were to arise in the case of an employee walking out without notice, the same principles would apply.

Although the law as above set out is quite clear, that does not mean that from a practical point of view it is normally advisable for the employer not to state the grounds upon which he is acting. It is often regarded—especially by a jury—as a serious matter if there is withheld from the employee information on a point which so vitally affects him, viz. the reason why he was dismissed. For obvious reasons, too, grounds of dismissal which are not stated at the time, but which are subsequently relied upon, come to be scrutinised with perhaps more than normal care—to ensure that they are free from any taint of having been manufactured later. So the employer who has not said why he dismissed his employee summarily—or who does not state all the grounds—may well have to fight any resulting litigation under quite a severe handicap: he should take that fact well into account when making up his mind how to act.

CHAPTER IV

THE POSITION AFTERWARDS

WHEN once an employment has been ended and both parties have suited themselves by obtaining fresh employment or a substitute employee respectively, it is usually found that the best course is to let old problems be buried —however tempestuous may have been the parting. In a certain number of cases, however, the parties wish to assert their rights, and indeed it may be necessary for them so to do in order to protect themselves for the future. The object of this chapter, accordingly, is to set out what are the main rules with regard to those rights which can be enforced when the relationship of employer and employee no longer continues.

ACCOUNT

In the first place, both parties have a right to obtain against each other a Court order for an account, if there is a *prima facie* case for suggesting that money is due from one to the other which can only be ascertained by taking a proper account—disclosure of appropriate documents being thus enforced.

In the case of the employee, this right may be of importance where part of his remuneration was paid by way of commission. He is entitled to an order for an account of all the orders received or profits made upon which his right to commission depends, provided that he can show that—

(*a*) no such account has yet been given or,

(*b*) the account given is not complete.

This applies equally where the commission becomes payable solely upon orders received during the continuation

of the employment or where there is some provision for a continuing commission, e.g. payable on all orders from a given customer, whether received during or after the period of employment.

Similarly, there may be occasions when the employer is not satisfied that he has had a full account of all the monies which his employee has received, or where there is some adjustment to be made as between receipts and expenses; here again, if a *prima facie* case is made out that all the appropriate information has not been rendered, a Court order for an account will be granted.

DAMAGES

As has before been stated, each party to a contract of employment is entitled to recover any damages which he may have actually suffered as a result of a breach by the other party of one of its terms.

The Employer's Rights. In practice, this is a right which the employer rarely exercises, but it exists none the less and may at times be important, especially where higher grade employees are concerned. Thus, the employer is entitled to damages for two main classes of breach of contract.

The first is where he suffers damages on account of some piece of misconduct. This includes a wide variety of matters, e.g. loss of custom due to some piece of carelessness, breakage of machinery due to negligent handling, or loss of profits because a trade secret has been given away.

The second class of case is where the employee wrongfully terminates the contract of employment—either by doing something which, in practice, renders it necessary for him to be instantly dismissed, or if he unjustifiably walks out without giving proper notice. The damages for such repudiation by him of his contract are assessed on the normal lines that the employer is entitled to be

put into the same position, financially, as if the repudiation had not occurred. The resulting damages, therefore, include any advertising or other expenses to which the employer may be put in obtaining a substitute of equal ability, any extra remuneration which he may reasonably have to pay such a substitute over and above the rate being paid to the former employee, and any special loss to which he may in the natural course of events be put through having no substitute employee whilst he is trying to find a replacement.

The last head would, for instance, be applicable if the specialist member of a team "walked out" with the result that the rest of the team could not carry on, but had to be paid; further, in such a case, the former employee would be liable for any inability of the employer to earn those profits which he could have made had the full team been at work. A similar claim for loss of profits would arise if a "one-man team" in a branch shop left without due notice—and there are a large number of analogous cases.

The Employee's Rights. It is, however, the employee who more usually initiates a claim and litigation for damages after he has left his employment. He, too, can claim for any *isolated* instance in which a breach by the employer of the terms of the contract has put him to loss. Such might be the case if he was wrongfully denied an opportunity to which he was entitled under the contract to earn some commission: more frequently, however, such claims arise out of accidents.[1]

The best known class of claim put forward by former employees is, of course, that for damages for wrongful dismissal. (Such damages would equally be recoverable if the employer had made things so impossible for the employee that the latter was justified in terminating the employment immediately.[2]) In an action for

[1] For measure of damages, see p. 25, *ante*. [2] See p. 41, *ante*.

wrongful dismissal, we have already noted that when once the employee has proved the terms of his employment and has also established that the termination took place in a manner which, *prima facie*, is contrary to those terms (e.g. if he is given no or no sufficient notice), then the onus lies on the employer to prove that the dismissal was justified. In other words, it is for the employer to prove not only that there was misconduct, but that that misconduct was so serious as to be good cause for the dismissal: it is not for the employee to establish affirmatively that he did his work properly.

If the employer fails to justify the dismissal, then the damages recoverable are assessed upon the same principle as in the case of a repudiation by the employer—the Court seeks to put the employee into the same position financially as if the contract had been duly carried out. In this connection the word "financially" is of considerable importance. Thus, the employee is not entitled to recover damages for the loss of reputation which may well follow upon an unjustifiable dismissal by a reputable firm. Similarly, the damages may not include anything for the increased difficulty which that dismissal may cause him, after the expiration of what should have been the contract period, in getting fresh employment.[1]

The result is that normally his rights are to recover (in addition to any salary or commission which became due before the dismissal) by way of damages, the difference between what he would have earned during the remainder of the contract period (had it been terminated in a correct manner) and what he in fact actually earned during that period. If the action comes to trial before that period has elapsed, then the Court does its best to assess what his earnings during it will be, and thus assesses the requisite sums.

The employee also can recover any special expenses to

[1] *Addis* v. *Gramophone Co.*, [1909] A.C. 488.

which he is put in the way of advertising or otherwise in seeking a fresh post. In addition, there is one further head of damage which is recoverable in those exceptional cases where the employee is entitled to actual employment producing publicity;[1] in such a case, he is entitled to recover damages for the loss of publicity he would normally have had—again making due allowance for such publicity as he may receive under any fresh employment during the contract period.

As in all other cases where damages are recoverable, it is the duty of the injured party to mitigate those damages as far as he reasonably can. If he fails in that duty, then the Court will award him no more damages than, in its view, he would have suffered had he taken reasonable steps in mitigation. That means, for instance, that an employee must take the proper steps to seek fresh and suitable employment—by advertising, by registering at suitable places, and so forth. On the other hand, he is not normally bound to accept some inferior position, to turn to some quite different occupation (unless compelled so to do by physical injury), or otherwise to do anything which is against his reasonable interests. Incidentally, he would not be expected to mitigate the damages by accepting re-employment from an employer who had insulted him or otherwise destroyed the basis of confidence between them, even if that employer offered him a job of similar status to his old one.

Naturally, on these cases of summary termination of employment, questions arise as to rights under Pension Schemes: these schemes are always administrated under special provisions and often by special trustees; it is accordingly not within the province of these chapters to discuss Pension Scheme rights, which in any event always turn on the special terms of the particular Scheme.

[1] See p. 22, *ante*.

REFERENCES

The question of references is often obviously of vital importance to the employee. It is, however, entirely within the discretion of the employer as to whether or not he will give one. The employee has no right to a reference.

The duties of the employer when he does give a reference are simple. He is entitled to say and should say what he *bona fide* believes to be true; upon doing that, he is under no liability either to the future employer or to the ex-employee. If he makes a statement that he knows to be untrue, but is in favour of the employee—and the same applies when a deliberately false impression is conveyed—he naturally becomes liable to an action for fraud if the future employer is deceived and suffers damage. If he makes a statement to some third person which he knows to be untrue—or deliberately gives a false impression—to the detriment of the employee, then the latter can sue him for libel if the statement is written or for slander if it is verbal.

If sued for libel or slander for statements made in references what defences are available to the employer? Firstly, if a statement is true, then the person about whom it is made cannot claim damages on this account. Secondly, a reference is subject to qualified privilege; that means that no claim can be made for damages suffered on account of its contents, even if they are untrue, provided that the statements were made in the *bona fide* belief that they were true and without any indirect motive.

The reason, however, why the average employer is apt to tone down any adverse statement in a reference is that, however reasonable his attitude, he may always be shot at and find himself in difficulties. Naturally, no one can stop an ex-employee bringing an action—and such

an action may involve the employer not only in unpleasantness, but in heavy irrecoverable expenses. Again, he always runs the risk that the accuracy of some true accusation made by him may be very difficult to prove in Court; and there is the further snag that the employee may find a peg amongst old quarrels upon which to hang an allegation that the statement in the reference was not *bona fide*, but was due to some form of what the law calls malice. Hence the understandable tendency to caution.

A word should here be said about what are sometimes referred to as general references. These are the references which are not addressed to a particular person, but "to whom it may concern." How far such a reference is really useful is a matter upon which everyone will have his own opinion; but at least they do show the nature of a man's employment in the past and the persons from whom information may be sought. Such a reference, unlike those which are given to a specific prospective employer, are the property of the ex-employee. He is usually proud of them and they must be returned to him whenever he so desires.

CONFIDENTIAL INFORMATION

When an employee has acquired confidential information during his employment, he may not sell, give away, or otherwise misuse it after the employment has terminated, any more than whilst it is continuing. Any breach of that duty would render him liable to damages, and also subject to the operation of an injunction if the Court thought fit.

Though the continuing duty in respect of confidential information is clear, there may be considerable difficulty in ascertaining whether any individual piece of information would be regarded by the Courts as being confidential. The number of cases which have been decided with regard to the disclosure of confidential information have hitherto

been comparatively few, and the judgments have been careful to confine themselves to the particular facts. Anyone approaching this subject must accordingly proceed with caution.

A reasonably safe starting point, however, is to take it as a general rule that the knowledge which an employee has legitimately learned and which he can carry away in his head, is knowledge which he may use as he pleases. For it is the general policy of the law that it is in the public interest for an employee to acquire as much skill and knowledge of his trade or craft as he can, and that he should then be free to use what he has learned. How, then, do we identify the exceptions to the rule? Exceptions so far decided have fallen within one or other of the following three categories—

(*a*) Information which has been defined as confidential by the express terms of the contract between the parties.

(*b*) Information which has been obtained surreptitiously by the employee.

(*c*) Facts which, having regard to the nature of the employment, would obviously have been regarded by both sides as being confidential had they attempted to define the position.

As regards the *first* category, no real difficulty generally arises—though it may happen that cases will come up for decision where the employer is really seeking under guise of such a clause to prevent the employee using his properly acquired skill, and then public policy will become involved.[1]

Again, the *second* category is fairly clear—and includes the employee who makes copies, without his employer's consent, of tables and dimensions[2] or of lists of customers.[3]

[1] Cf. *Triplex Safety Glass* v. *Scorah*, [1938] 1 Ch. 211.
[2] *Merryweather* v. *Moore*, [1892] 2 Ch. 518.
[3] *Robb* v. *Green*, [1895] 2 K.B. 315.

He may neither pass them on to others, nor use them for his own benefit.

With regard to the *third* category, however, it is far from easy to provide satisfactory tests. Clearly the employee to whom some special process is communicated under circumstances which show him that it is intended to be kept secret cannot proceed to disclose it to third parties.

Neither may the doctor's secretary nor the solicitor's clerk disclose the secrets which have come to their knowledge through the professional activities of their employers. Those examples are reasonably obvious, but what about salary lists and margins of profit? The former have been held[1] to be confidential when a trade union sought to obtain them from a manager, and the same principle would presumably apply to the latter. But whilst an employee could be prevented from disclosing such figures either to a new employer or to third parties after his original employment had ceased, he could hardly be stopped from using the knowledge as a basis on which to start some competitive business of his own. It is on a similar ratio that the employee who may not surreptitiously make a list of his employer's customers can yet carry away in his head as many of their names as he can and then, unless he is subject to some special restraint,[2] proceed legitimately to canvass these when he starts to compete with his former employer.

It is on account of problems such as those just mentioned that I have suggested the likelihood of the Court applying, in a good many instances, the practical test of "what can be carried away in the employee's head" to decide at any rate what legitimately acquired information may be used by the ex-employee for his own benefit,[3]

[1] *Bent's Brewery* v. *Hogan*, [1945] 2 All E.R. 570. [2] See next page.
[3] Cf. *United Indigo* v. *Robinson* (1931), 49 R.P.C. 178.

even if he is not entitled to sell or otherwise dispose of all that information to third parties.

FREEDOM TO COMPETE

From quite early days the law has leant against the validity of covenants which restrain an employee from using his talents freely after his employment has ended. In the earliest reported cases it took a very drastic view, and would allow no restraint at all. In the reign of Henry V, a judge considered that there should be a penalty of imprisonment and fine for an employer who exacted a bond restraining one of his employees from becoming a competitor within a radius of half a mile from his former employer's business. In the days of Queen Elizabeth, the principle was laid down that "free men should be free to exercise their trade in any place." In more modern days, this principle has been used as a starting point for considering each case; the words of Lord Macnaghten in the *Nordenfelt* case, [1894] A.C. 535, are often cited where he says (at p. 565) as regards contracts—

> The public have an interest in every person carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule.

To that rule there are, however, exceptions. Thus, it being obvious that employers should not be discouraged from taking good men into their employment by the risks of unfair competition later,[1] the law does permit to be valid certain covenants which restrain the ex-employee from such competition. But only after it is proved that the restriction sought to be imposed extends as regards both time and space only so far as is reasonably necessary

[1] *Attwood* v. *Lamont*, [1920] 3 K.B. 571, (Younger, L.J., p. 583).

for the protection of the employer's business, whilst not interfering with any interests of the public at large. That proof is not always an easy matter to provide. The first obstacle is that covenants restraining ex-employees from competition are usually in terms drafted by the employer; so the rule *contra proferentem* applies, i.e. any ambiguity in the covenant is construed against the employer who proffered the document.

The next hurdle facing the employer who seeks an injunction is that whenever an ex-employee challenges such a covenant the onus rests upon the employer to establish to the satisfaction of the Court that the restriction does not relate to more activities, to a greater area, or to a longer period than is necessary for the above-mentioned purpose. When considering the problem in each case, the Court will look at the nature of the employment, as well as the extent of the employer's business—so there is a good deal to be gone into. Thus, the employee in one department of some big store might be held to be unreasonably restrained if subjected to some covenant which might yet be valid if applied to the general manager of the stores.[1]

The Courts will, however, in suitable cases, assist the employer to this extent, that if one part of a restraining covenant is reasonable, but some severable part is not, they will in effect delete the latter, while leaving the former intact. Thus, a covenant imposing a restraint as regards "Reading and the Home Counties," might be held to be reasonable and valid as regards Reading, but unreasonable and invalid as regards the Home Counties; this would involve a severance which could not have taken place had the covenant been worded simply to

[1] For useful lists of cases on restrictions on competition classified by trades see Diamond on *Master and Servant* (1946), p. 277, and *Pollock on Contract* (1946), p. 328.

relate to the Home Counties—in which case the restraint would have been wholly invalid.

Generally speaking, however, the law as to these restrictive covenants is somewhat intricate, and anybody who seeks to get the benefit of one should seek advice before rather than after a dispute has arisen upon it—and should be content with a little, and that safe, rather than try and seek too much with all the resulting risks of invalidity. Indeed, on the other side of the fence, it is almost always worth an ex-employee's while to have advice on any restrictive covenant that irks him. The loopholes are numerous.

CONCLUSION

In the course of these chapters we have traversed the field covered by the general law of contract in its application to a particular relationship—that of employer and employee.

In the course of that application we have seen many instances of how the Common Law of England has adapted its course so as to ensure that employers and employees can treat with each other as free citizens; so that both may be aided in the working out of a code of implied terms to meet in a reasonable way the many contingencies for which express provision is not normally made; and so as to destroy, so far as it can, any chance of that sort of oppression which might savour of serfdom.

There are, of course, instances where the Common Law has followed a path which, whilst sufficiently suitable for other forms of contract, held implications as regards the relationship of employer and employee which were not realised till too late, and which have been found in the event to work somewhat hardly. In those relatively rare cases—as also in the numerous matters, social and economic, which, whilst touching the public conscience, are

not for lawyers to decide—it is for the legislature to intervene; though it should be for lawyers to prompt that intervention, as they did in the case of the Law Reform (Frustrated Contracts) Act, 1943. But taking that relationship of employers and employees as a whole, the Common Law can look without regret at its record of having done much to preserve for the employee at least four freedoms—freedom to choose his employer as well as his occupation, freedom to bargain, freedom, so far as injunctions are concerned, to change his employment, despite the terms of that bargain, and freedom from unreasonable restraint when the employment is done.

APPENDIX I

"ENTICEMENT" OF EMPLOYEES

NOT infrequently an employer becomes worried because he fears that some competitor (for convenience referred to as "the rival" in this Appendix) is trying to entice away his employees. Usually the occasion is when some competitive business is first set up in the neighbourhood. What rights has the employer—and how can he protect himself?

The law on the subject is quite clear; the rival is entitled to persuade into his employment the employees of another, provided that when so doing he neither—

(*a*) induces the employee to break his contract with the existing employer, nor

(*b*) uses illegal methods of persuasion.

It is thus wrong to try and induce an employee to leave his employer without due notice or in breach of some valid[1] covenant against being employed by a rival in the locality. It is also wrong to make use of tricks or pressure which are either criminally or civilly illegal in order to get the employee to leave: a fraudulent statement that the employer is about to close down is one type of trick which has been used in the past, and other types of fraud and pressure are not unknown. But a straight offer of a better salary or of better working conditions to those who are prepared to leave their present employer after giving and working out due notice is legally permissible—whatever, in certain circumstances, may be the moral view.

Should, however, the rival who is trying to win over employees infringe either of provisos (*a*) and (*b*), the law can step in with speed and force. Not only can the

[1] See p. 53, *ante*.

injured party obtain damages, but the Courts may grant a suitable injunction straight away. Once there is a reasonable *prima facie* case that the rival is attempting to induce an employee to break his contract, or is using illegal methods, the Court readily grants at the very outset of proceedings an interim injunction to restrain such acts, unless the rival gives a Court undertaking to refrain from them; such injunctions and undertakings alike carry a penalty of imprisonment for contempt if they are flouted.

One reason why such remedies are promptly available is that the Court is asked to do no more than help to prevent an illegal act, which the defendant should—whether guilty or not guilty of previous wrong-doing—always be only too willing to undertake to refrain from perpetrating (without prejudice, of course, to questions of costs, which can be dealt with later in the proceedings).

Should the case fall within proviso (*a*) on p. 57, the employee is also in default if he breaks his contract. He would become liable to pay damages[1] if he leaves without notice, and may himself be restrained from entering into the employment of the "enticing" rival, until the period of a proper notice has expired. The defaulting employee and the rival can be made joint defendants to one action.

This Appendix deals only with the position where a rival tries to entice away the employees of another; it is as well, however, to add that, even when there has been no enticement, the rival may incur liabilities to the previous employer through employing, before the proper "notice period" has expired, someone who has not given proper notice. That liability attaches to the rival as soon as he knows that his new employee is in default towards his previous employer—even if he knew nothing

[1] See p. 45, *ante*.

of it when he engaged the employee: it continues till the "notice period" expires. The rights which give rise to such liabilities are rarely enforced nowadays—but they exist and may, in certain instances, hit the rival heavily.

APPENDIX II

PATENTS AND COPYRIGHT

(By K. E. Shelley, K.C.)

PATENTS

If an employee produces an idea or a device which is sufficiently novel and ingenious to be patented (in legal language, something which is good subject matter for the grant of Letters Patent), questions may arise as to whether it shall in fact be patented, by whom the patent shall be taken out and to whom the patent shall ultimately belong.

In accordance with patent law the actual inventor must be the applicant for a patent or one of the applicants.[1] Whether an employee can be forced to take out a patent, and whether he can be compelled to assign the patent to the employer depend on the particular circumstances of each case.

Apart from some express agreement, if the invention has no connection with the actual work he is employed to do, the invention belongs entirely to the employee. He may patent it or not as he pleases and, if it is patented, sell or license the patent to any one, however useful the invention may be for some other branch of his employer's business and however badly the employer may want it.

If the invention is made by the employee in the course of doing some work which he has been instructed by the employer to do, whether it is his ordinary job or not, the invention belongs to the employer.[2] This is so because otherwise the employer, despite having paid for the employee's work, might be prevented from making use of the result. The employer can in such a case insist on the invention being patented and the patent being assigned to him alone, but he must pay all the expenses involved.

[1] Patent and Designs Acts, 1907–1946, Sect. 1 (1).

[2] *Adamson* v. *Kenworthy*, (1931), 49 Reports of Patent Cases 57.

A dispute may arise as to whether the employee made the invention independently or whether it arose out of instructions given by the employer. All the circumstances must be taken into account; thus, if the invention was made in the employer's time or with the employer's materials, this would tend to support the view that the invention belonged to the employer. Similarly, if the employee made the invention in his own leisure hours and took out a patent at his own expense, this would be more consistent with the invention being the property of the employee, unless the application for the patent was concealed from the employer.

If the circumstances are such that the invention belongs to the employer, an employee who refuses to sign the necessary documents to obtain a patent or to assign it, can be forced to do so by legal proceedings. Apart from some definite agreement, the employee is not entitled to any extra payment for making an invention, nor for assigning the patent to an employer who is entitled to the benefit of it.

Not infrequently the terms of an employment in which inventions are likely to be made are set out in a written agreement. In such cases it is usual to include a clause defining what shall be the respective rights of employer and employee in the event of the latter making an invention in the course of his employment and the normal rules set out above apply only so far as they are not inconsistent with the written agreement. It is often provided in such agreements that all inventions shall belong to the employer, who shall have an absolute right to decide in what countries patents shall be applied for, and that the employee shall be entitled to such renumeration as the employer in his sole discretion shall think fit. Such a clause is by no means valueless to the employee, for without it he might well not be entitled to anything, whereas under it the employer must in good faith consider

whether he ought to give some reward to the employee. If he fails to consider this question properly, he will be liable in damages.

COPYRIGHT

The general rule is that the author of an original literary, dramatic, musical, or artistic work obtains copyright in that work without any registration or other formality—

(*a*) if it is first published in His Majesty's Dominions, or;

(*b*) if it is unpublished, and the author is a British subject or resident in His Majesty's dominions.[1]

But if the author is in employment under a contract of service[2] or apprenticeship and the work was made in the course of his employment, the employer, in the absence of any agreement to the contrary, becomes the first owner of the copyright. The employer acquires this copyright automatically, without any formality, as soon as the work comes into existence.

If the work is an article or other contribution to a newspaper, magazine, or similar periodical, the author, in the absence of any agreement to the contrary, has the right to restrain the publication of the work otherwise than as part of a newspaper, magazine, or similar periodical.[3] The effect of this is, e.g. that if a newspaper proprietor wishes to publish in a book an article contributed to his newspaper by one of his regular staff he must make a special bargain with the employee (the author) and the employee can demand additional payment for this right. But, all the same, the employee cannot, without the employer's consent, licence other persons to publish the article in a book, for that might be to the detriment of the employer's rights, even though these are limited to newspapers, magazines, or similar periodicals.

[1] Copyright Act, 1911, Sects. 1 and 5.
[2] See p. 2, *ante*.
[3] Copyright Act, 1911, Sect. 5 (1) (*b*).

APPENDIX III

TABLE OF STATUTES

APPENDIX IV

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